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Paper Nos. 13 & 14
DEB

Hearing: August 10, 2000

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Johnson & Johnson

Serial Nos. 75/481,908 and 75/454,697

Amy E. Carroll and Norm D. St. Landau of Drinker Biddle & Reath for Johnson & Johnson.

Amy E. Thomas, Trademark Examining Attorney, Law Office 110 (Chris A.F. Pedersen, Managing Attorney).

Before Hohein, Wendel and Bucher, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

This appeal involves two applications filed by Johnson & Johnson.

On March 23, 1998, applicant filed Application Serial No. 75/454,697 for the mark "REACH POWERBRUSH" for a "battery-operated toothbrush" in International Class 21, based upon an asserted *bona fide* intention to use the mark in commerce.

Application Serial No. 75/481,908 for the following composite mark was then filed on May 8, 1998, also for a "battery-operated toothbrush" in International Class 21, and similarly based upon an asserted *bona fide* intention to use the mark in commerce:



In each case, the same examining attorney issued a final refusal to register absent applicant's entry of a disclaimer of the allegedly merely descriptive term "POWERBRUSH." Section 6(a) of the Trademark Act. In each case, applicant timely filed a notice of appeal, and each case was fully briefed. At applicant's request, an oral hearing was conducted on August 10, 2000 on the "POWERBRUSH and design" mark, although a request for an oral hearing on the "REACH POWERBRUSH" application was withdrawn. The prosecution histories of these two applications are substantially identical, as are the issues before us in connection with both applications. Accordingly, the two cases have been consolidated and this single opinion issued for both.

The sole issue before us is whether or not the term "POWERBRUSH" is merely descriptive of a "battery-operated toothbrush" under Section 2(e)(1) of the Trademark Act, and accordingly must be disclaimed apart from the marks as shown.

The Trademark Examining Attorney takes the position that the wording "POWERBRUSH" is legally the same as "power brush." The Trademark Examining Attorney argues that the evidence of record shows the term "power brush" to be synonymous with

"powered brush" or "power-operated tooth brush."

Consequently, the Trademark Examining Attorney contends that this term describes a feature of applicant's toothbrushes, and hence the wording "POWERBRUSH" must be disclaimed apart from the marks as shown. Trademark Act Section 6, 15 U.S.C. §1056.

On the other hand, applicant argues that the evidence produced by the Trademark Examining Attorney is biased in its selection, and that the few relevant articles are insufficient to establish that the average consumer would understand the assertedly unique combination of these two words to be merely descriptive.

Applicant further argues that each of its marks incorporates a double entendre, in that there are other meanings for the word "POWER" in the context of its composite. While it might well suggest "battery-powered" to some consumers, applicant contends it is equally plausible that consumers will interpret the word "POWER" within its marks as meaning "effective" in the ability of the product to get a job done, or even connoting "glamorous":

The POWERBRUSH mark is also unique in that [sic] its inventive juxtaposition of the term "power" with "brush." While consumers would associate the term "power" with independent ability, ease of operation and even glamour, the term "brush" would evoke the thought of effort, exertion and non-glamorous chore. This juxtaposition creates a playful contradiction in the mark - POWERBRUSH sounds like something

new and glamorous that is at the same time standard and commonplace. The humorous image of a "supercharged cleaning implement" suggested by Applicant's mark provide [sic] strong evidence that POWERBRUSH creates a unique commercial impression and is well beyond the realm of the "merely descriptive." (Applicant's appeal brief, p. 5)

A term or phrase is merely descriptive within the meaning of Section 2(e)(1) if it immediately conveys information about a characteristic or feature of the goods or services with which it is being used. See In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978). It is not necessary that the term or phrase describe all the characteristics or features of the goods or services in order to be merely descriptive; it is sufficient if the term or phrase describes a significant attribute thereof. See In re H.U.D.D.L.E., 216 USPQ 358 (TTAB 1982). Furthermore, the test of mere descriptiveness is not done in a vacuum, but rather the proposed mark must be evaluated in the context of its application to the goods.

We first turn to the Lexis/Nexis® evidence made of record by the Trademark Examining Attorney to support her contention that the term "power brush" will be understood to refer to a battery-powered toothbrush, or a powered toothbrush.

The following are representative of the excerpts:

Power brushes:¹ important additions
Electric oral care products have been hot ...
This category's surge in sales can be traced to
technological advances... "Small appliances:
Annual Report Part 2: Category by Category,"
Drug Store News, May 20, 1996.

There are two types of power brushes on the
market today that you can choose from - the
standard electric and the newer "sonic" models.
"Powered Brushes win our respect," Prevention,
December 1995.

What makes Sonicare different from a
conventional power brush is its technology.
"High Tech innovation in dental care ...," Puget
Sound Business Journal, September 12, 1997.

"The purchase of power brushes at the \$100
price point is not an impulse purchase," said
Bill Bassett, marketing manager for Sonicare...
"If you want to encourage more people to buy a
power brush and trade up, you have to be
present when they buy manual toothbrushes, such
as pharmacies and mass merchants," said Steve
Jones, [Rowenta's] Marketing Manager...
"Different strokes for different folks;
Marketing of power-assisted toothbrushes," HFN
- The Weekly Newspaper for the Home Furnishing
Network, December 16, 1996.

"Long term, there's not a lot of data saying
that power brushes outweigh manual," says
Wozniak. "Time and technique are the key
factors." "HMO report cards," Kiplinger's
Personal Finance Magazine, October 1995.

The dentist or hygienist should also advise you
on such preventive extras as fluoride use,
antibacterial rinses, and any supplemental oral
hygiene aids you may need, such as an
irrigator, a power brush, or floss threaders ...
"Office Visits; Examining your Dentist...,"
Consumer Reports on Health, November 1992.

¹ Underlining contained in source document.

Next time you're in a full-service drugstore, take a look at the oral-hygiene section.... Somewhere on the shelf you'll also find two or three electric or power brushes... "Baffled by Brushes," Saturday Evening Post, May 1987.

"Your teeth have a lot to smile about these days, thanks to the latest home dental care. From power brushes to new toothpastes, there's a whole array of new products out there..." (Jane Robelot, on "CBS This Morning," introducing Dr. Roland Hassan, Dentist, July 14, 1997).²

From this Lexis/Nexis® evidence, we are convinced that "power brush" is a recognized term used to refer to an entire category of oral hygiene appliances comprising battery-powered or electric-powered toothbrushes. While the term normally used is the two-word combination, we are without any doubt that the term "Powerbrush," in which applicant runs the two words together, would be perceived by the public as the equivalent of "power brush."

The Lexis/Nexis® evidence reviewed above includes periodicals directed to consumers in general, to consumers specifically interested in dental hygiene, as well as to merchants who sell this type of product at the retail level. Accordingly, in focusing on the usages of the term "power brush" (or "power brushes") in these articles from periodicals of general circulation, we find it unimportant which

² Unless indicated otherwise, emphasis by way of underlining of power brush or power brushes has been supplied.

particular sub-file or electronic library within the larger Lexis/Nexis® database the Trademark Examining Attorney may have utilized (e.g., "GENMED") to retrieve these stories.

In addition to the clear evidence from the Lexis/Nexis® database, the Trademark Examining Attorney has submitted various dictionary entries of the words "power," "brush" and "toothbrush." In the context of the compound term "power•brush," the modifying word "power" will be readily understood as meaning electric- or battery-powered, as opposed to something that might be modified by the word "manual."³ As seen in the dictionary entries in these two files, the English language contains combined terms like "power drill," "power mower," "power shovel," "power steering," "power tools," etc. Hence, whether one is focused on drills, mowers or toothbrushes, a combined term beginning with the word "power" provides a ready contrast to a "manual" or "non-powered" instrument achieving much the same results.

Thus, we find that the term "POWERBRUSH," when encountered by potential purchasers in connection with applicant's goods, would immediately convey information to purchasers that the goods are power-operated toothbrushes as

³ In fact, that contrast is pronounced in several of the Lexis/Nexis® excerpts above where the speaker or writer is noting the consumers' range of choices when selecting a toothbrush.

opposed to manual toothbrushes. The record confirms that the combined term "power brush" is frequently used in speaking and writing to refer to battery-operated toothbrushes, and that "power brush" identifies a genre of dental appliances that are the subject matter of applicant's trademark application.

Hence, we cannot agree with applicant that it would require any amount of mental gymnastics or imagination on the part of consumers to make a correlation between the term POWERBRUSH and the consumer item itself, a power-operated toothbrush. When viewed in this fashion, the descriptive significance herein of the term "POWERBRUSH" as referring to a power-operated toothbrush is clear.

Although applicant argues that its marks feature a clever double entendre, the facts of this case establish that the particular word combination at issue has had a recognized meaning in the dental appliances field for more than a dozen years. It has a widely accepted and understood significance, which is plainly characterized as being merely descriptive of these goods.

To the extent that the word "power" alone may have the ability to project a meaning of "independent ability, ease of operation and even glamour," as argued by applicant, we are not persuaded by applicant's contention that this case should turn on a "playful contradiction in the mark[s] -- POWERBRUSH

sounds like something new and glamorous that is at the same time standard and commonplace." This slight possibility is further reduced when the word "power" is used in combination with the word "brush" and applied to applicant's particular product. Purchasers are most unlikely to attribute these other meanings to the word "power" in the context herein.

Decision: Accordingly, we find the term "POWERBRUSH" to be merely descriptive of a feature of applicant's recited goods. The refusal to register applicants marks "REACH POWERBRUSH" and "POWERBRUSH and design," on the basis that a disclaimer of the word "POWERBRUSH" must be entered. However, in accordance with Trademark Rule 2.142(g), this decision will be set aside and applicant's "POWERBRUSH and design" and "REACH POWERBRUSH" marks will both be published for opposition if applicant, no later than thirty days from the mailing date hereof, submits an appropriate disclaimer of the term "POWERBRUSH" in each of these applications.